In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 485

LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS UNION, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *Petitioner*,

vs.

LESTER MORTON, d/b/a LESTER MORTON TRUCKING COMPANY, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INDEX

TABLE OF CASES

TEXTBOOKS.

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PETITIONER'S REPLY BRIEF

I. IN AN EFFORT TO REFUTE LOCAL 20's POSITION, THE RESPONDENT HAS DEVELOPED NEW, AND REFORMULATED HIS OLD, ARGUMENT

This brief is addressed to these arguments, which are:

(1) This case involves "threats to public order and intimidation." (Resp. Br. p. 35)

(2) The loss of the Wilson account is, in part, attributable to picketing at secondary sites. (Resp. Br. p. 15)

(3) The "Union activity for which the District Court granted compensatory and punitive damages under the State common law was neither arguably protected nor arguably prohibited by . . . Act . . ." (Resp. Br. p. 39)

(4) The "totality of effort" rule is an application of established principles of the law of damages. (Resp. Br. pp. 17-23)

Before turning to these arguments, we note that Respondent failed to discuss, much more to meet, Local 20's position that Congress, in creating Section 303, intended that it should provide the sole basis for damages flowing from peaceful conduct during a labor dispute, and, accordingly, damages based upon state policy have no role to play (Pet. Br. pp. 22-26).

In the absence of any such answer, we ordinarily would not burden this brief with further discussion of the point. However, an intervening decision of this Court prompts additional comment. In *Sears Roebuck & Co. v. Stiffel Co.*, 11 L.Ed.2d 661, the Stiffel Company sued Sears in the federal district court alleging that Sears had infringed its patents and engaged in unfair competition as defined by Illinois law. The lower courts held the patent invalid but awarded damages under Illinois law. The Stiffel Company did not contest the invalidation of its patent. Sears sought review of the damage award which had been predicated upon state law. On certiorari, this Court reversed the judgment which awarded damages under state law, stating in part (11 L.Ed.2d at 667):

> "Just as a state cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws."

In short, when Congress enacted Section 303, it contemplated that the peaceful conduct there prohibited

would constitute the sole basis for an award of damages and that labor unions engaged in labor disputes would be otherwise free from liability for damages resulting from peaceful activities. To award damages for the loss of the Launder account and to assess punitive damages—neither of which are bottomed upon Section 303—is surely to give employers "protection of a kind that clashes with the objectives of the federal" labor laws. (Cf. *Stiffel Co.*, 11 L.Ed. at 667.) It is, therefore, submitted that such damages cannot be sustained.

II. THE RECORD DEMONSTRATES THAT THERE WAS NO THREAT TO PUBLIC ORDER OR INTIMIDATION AND THAT THE LOSS OF THE WILSON ACCOUNT WAS UNRELATED TO THE SECONDARY PICKETING

A. The "Threats to Public Order and Intimidation"

Respondent's first argument that the judgment can be sustained because of threats to public order and intimidation—an argument which made its debut in Respondent's brief in opposition to Local 20's petition for writ of certiorari—has been covered in the briefs previously filed in this Court (Pet. Reply Brief in Support of Pet. for Writ of Cert., pp. 1-7; Pet. Br. on the Merits, pp. 32-34). We reply again because of the strong reliance placed on this point by Respondent.

The *only* witness Respondent called whose testimony is even remotely supportive of his claim was one Taulbee; and Taulbee "never seen no trouble" (R. 199). Respondent, in his brief on the merits, attempts to bolster —and bolstering is indeed necessary—Taulbee's testi-

mony with two factual representations not supported by the Record. First, Respondent says (Br. p. 35):

> "On the first day of the strike the Teamsters Union sent 25 to 30 men (R. 44) to picket the Respondent's premises. . . ."

But the testimony of Respondent's witness on cross-examination was as follows (R. 62, 63, 64):

> "Q. On the first day of the strike were any of the cars parked in the driveway areas leading in and out of Mr. Morton's premises?
>
> A. Not in the driveways, no.
>
> Q. At any time did you observe any of the cars parked across the driveways entering into Mr. Morton's premises; that is, a car permanently left there in the driveway?
>
> A. No.
>
> Q. Were the men who appeared at the scene of the picket line on the first day of the strike milling around in the area of their cars, standing around in groups and talking among themselves and things like that?
>
> A. Yes.
>
> Q. Were they standing in groups in the driveway areas?
>
> A. No, not in the driveways.
>
> Q. As a matter of fact, at no time during that first day of the strike were the driveways physically blocked either by the men themselves or by their automobiles, were they?
>
> A. No, they wasn't blocked.
>
> Q. You said that on the first day of the strike a

few [fol. 86] trucks came out of Morton's premises during the time you were picketing. At any time did you observe the driveways being physically blocked by cars or men?

A. No.

Q. Before the court order was given to you or called to your attention, Mr. Combs, how many men were actually in possession of picket signs and walking with those signs in their possession, do you recall that?

A. Well, all of us didn't walk at the same time with them, but there would be about four or five men, I would say, with paper signs and we had some drove in by the driveways."

Handicapped by a star witness who "never seen no trouble" (R. 199), Respondent has conjured up "25 to 30" pickets who never existed. Not satisfied, Respondent adds (Br. p. 39):

"The state court here considered it necessary to issue an order restraining mass picketing and secondary activity, which order was kept in effect throughout the strike, despite the Teamsters Union's efforts to have it removed."

Only one witness testified concerning the issuance of the state court order. In material part, he said (R. 230-231):

"Q. What was the nature of that litigation?

A. The plaintiff in this cause of action, Lester Morton, was also a plaintiff in an injunctive type proceeding in the state court. He had filed a Petition and an application for an injunction.

Q. I show you Plaintiff's Exhibit 2. Was this the injunction you are talking about?

A. Yes. This is a copy of the order, or journal entry, which was granted ex parte by the Judge of the Common Pleas Court of Seneca County.

Q. After the issuance of the ex parte order, Mr. Gallon, were any hearings held in the state court for further injunctive relief?

A. Yes. Some time within I believe a week after the issuance of this ex parte order, pursuant to a motion filed by myself on behalf of defendants in that action, a hearing was to be held in regard to the motion to vacate the injunction. [fol. 443] About the same time the attorney for the plaintiff had filed a motion for temporary injunction as well as, I believe, a citation for contempt and there was to be a hearing had primarily on those matters, I think.

Q. Was a hearing ever held?

A. It was begun, testimony was taken, but some time during the testimony at the judge's suggestion, I believe—and this was a different judge who had granted the order, the ex parte order — the hearing was recessed for the parties to negotiate a settlement of their differences, if possible.

Q. Was there ever a ruling based on the evidence by any of the state judges with respect to the matters in the complaint or petition for temporary injunction?

A. There never was."

Thus, at no point in the state court proceedings did any judge render an opinion or issue an order based upon the testimony of witnesses. The only state court hearing ever held "was recessed for the parties to negotiate a settlement of their differences. . . ." (R. 231). A

witness that "never seen no trouble," 25 to 30 pickets that never existed, a trial that was recessed and never resumed—this is the record which Respondent says establishes "threats to the public order. . . ." (Resp. Br. p. 3).

B. The Wilson Account and the Picketing at Secondary Sites

Respondent's misunderstanding or misinterpretation of the record is not confined to his assertions concerning the alleged — but non-existent — "threats to public order and intimidations" but extends to his statement that the lack of drivers leading to the loss of the Wilson account was caused, in part, "by the Teamsters Union's unlawful activity . . . in unlawfully picketing at secondary sites" (Resp. Br. p. 15). Here, again, Respondent apparently is relying upon Taulbee's testimony. Yet Taulbee nowhere asserts that Local 20's picketing at secondary sites contributed to his alleged fear.

III. CONTRARY TO RESPONDENT, THE DISTRICT COURT COULD NOT APPLY OHIO LAW TO LOCAL 20's REQUEST TO LAUNDER BECAUSE (A) SUCH A REQUEST IS A PROTECTED ACTIVITY; OR (B) EVEN IF IT WERE NOT A PROTECTED ACTIVITY, IT IS WITHIN THE AREA OF LABOR-MANAGEMENT LABOR RELATIONS PREEMPTED BY FEDERAL LAW

A. Requests to Employers to Boycott a Struck Employer Are Protected Activities

While Respondent is correct in his assertion that requests to customers of a struck employer to cease doing business with him are not arguably prohibited by the

Labor Management Reporting Act, 1947, he is wrong in his assertion that such requests are not arguably protected by the Act. It is clear such requests are protected activities. *National Furniture Mfg. Co., Inc.*, 134 NLRB 834, 850, 858 (1961), enf'd in part, 315 F.2d 280 (7 Cir., 1963); *Electronics Equipment Co., Inc.*, 94 NLRB 62 (1950), enf'd den. on other grounds, *NLRB v. Electronics Equipment Co., Inc.*, 194 F.2d 650 (2 Cir., 1952).

We need not demonstrate, however, that such requests are protected; we need only show that they are arguably protected. *San Diego Building Trades v. Garmon*, 359 U.S. 236. On the question whether such requests are arguably protected, this Court has spoken with a finality that leaves no room for doubt.

The request for cooperation addressed to Launder is not one bit different from requests involved in *San Diego Building Trades v. Garmon, supra.* In *Garmon*, the state court said (320 P.2d 473, at 475):

> "As to the facts it appears that . . . the defendants placed pickets at the plaintiffs' place of business, had the plaintiffs' trucks followed, threatened persons about to enter the plaintiffs' place of business with economic interference and injury and that by such conduct they induced building contractors to discontinue their patronage."

In *Garmon*, the state courts awarded damages and this Court reversed.

Similarly, the state courts in *Grocery Drivers v. Seven Up Bottling Co.*, 359 U.S. 434 awarded damages because, *inter alia*, the union requested "transportation companies to refuse to deliver merchandise to

customers of plaintiff" and induced "purchasers of Seven Up to refrain from doing business with plaintiff . . ." 301 P.2d 631, at 633. This Court reversed, *per curiam*, on the basis of *Garmon*.

Since this Court in *Garmon* held that state law was inapplicable to "an activity . . . arguably subject to § 7 or § 8 of the Act" (359 U.S. at 245) and since, as Respondent concedes, the type of request before this Court was not even arguably prohibited by § 8 after this Court's earlier decision in *Local 1976, Carpenters v. NLRB*, 357 U.S. 93, it follows that this Court concluded that such requests were arguably protected activities. (The dissenting opinion in *Garmon* is explicit on this point. 359 U.S. at 250, 254.)

Because this Court said a "boycott voluntarily engaged in by a secondary employer . . . is not covered by the statute" *(Local 1976 Carpenters v. NLRB, supra,* at 98-99), it does not follow that union inducement of a voluntary employer boycott is "not covered by the state." Section 7 affords no protection to activities of employers, but it does afford protection to activities of employees and their collective expression, labor organizations. Hence, Local 20's request is arguably, at least, protected by the Act.

B. Since, in any event, the Ohio Common Law of Secondary Boycott conflicts with the Purposes of Federal Labor Law, it Must Yield to that Law

Even assuming that federal law does not arguably protect Local 20's request to Launder, it does not follow that Ohio may prohibit such request. It is the existence of "potential conflict" between state and federal

purposes which determines "the extent to which state regulation must yield to subordinating federal authority." *San Diego Building Trades Council v. Garmon, supra,* at 241-242. For, if the state law applies to conduct that is of only "peripheral concern" (*Id.* at p. 24) to Congressional purpose, then there is an absence of potential conflict and state regulation is untouched. Even where "potential conflict" is present but state law is applied only to conduct involving interests "deeply rooted in local feeling," the states retain the power to act because in such limited instances potential conflict cannot, by itself, justify the inference of Congressional intent to deprive the states of such power *(Id.* at 243-244).

This exception to the general rule is, however, without significance in this proceeding (See Point II, *supra).* Hence, the issue here is whether the application of this state law to Local 20's conduct "potentially conflicts" with federal purposes or whether its application is of "peripheral concern" to those purposes.

We note at the outset that the Ohio common law of secondary boycott deals with labor relations, and more specifically with the type of conduct which Congress focused upon at the time it enacted Section 303. (See, generally, *Local 1976 Carpenters v. NLRB, supra).* Indeed, despite the holding below, it is far from clear that the Ohio common law, properly applied, would forbid any conduct not forbidden by Section 303. *W. E. Anderson Sons Co. v. Local 311, Teamsters,* 156 O.S. 541.

The conduct Ohio prohibited formed an integral part

of Local 20's effort to achieve its bargaining goals during its negotiations with Respondent (R. 20-21, 159, 185, 188-192, 201-209). Thus, the conduct was related to, and formed a part of, the process of collective bargaining. The promotion of this process is one of the fundamental purposes of federal law:

> "The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, at 104.

The process of collective bargaining entails parties, negotiations, collective contracts, administration of collective contracts, and economic pressures. Federal labor law dominates each of these aspects. It determines who must and who must not engage in collective bargaining. *J. I. Case Co. v. NLRB*, 231 U.S. 332; *Garment Workers v. NLRB*, 366 U.S. 731. It determines the conducting during, and the subject matter of, the negotiations. *NLRB v. Katz*, 369 U.S. 736; *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149; *NLRB v. Wooster Div., Borg Warner Corp.*, 356 U.S. 342. It prescribes the form of the final agreement, *H. J. Heinz Co. v. NLRB*, 311 U.S. 514. It sets limits to "the solutions that the parties' agreements can provide to the problems of wages and working conditions." *Local 24 Teamsters v. Oliver*, 358 U.S. 283 at 296; *NLRB v. Wooster Div., Borg-Warner, supra;* and it governs the administration of these solutions. *Teamsters Union v. Lucas Flour Co., supra.* State law, therefore, yields to this federal control. *Hill v. Florida*, 325 U.S. 538; *Local 24 Teamsters v. Oliver, supra; Teamsters Union v. Lucas Flour Co., supra.*

Federal law also governs the economic pressures which unions and employers may generate to support their bargaining positions:

> "[T]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents' International*, 361 U.S. 477 at 495.

Thus, federal law protects, prohibits, and to the extent that it neither protects nor prohibits, it permits specific economic pressures. See, *e.g.*, *Erie Resistor Corp. v. NLRB*, 10 L.Ed.2d 308; *Local 1976 Carpenters v. NLRB, supra; NLRB v. Insurance Agents' International, supra.* As Respondent concedes (Reps. Br. p. 39), federal law renders state law inapplicable to economic pressures protected or prohibited by federal law. *San Diego Building Trades v. Garmon, supra.* Respondent argues, however, that states may prohibit those economic pressures that Congress neither prohibits nor protects (Resp. Br. p. 40). But as this Court noted in *Garner v. IBT*, 346 U.S. 485 at 499:

> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

See also: *Retail Clerks v. Newberry*, 352 U.S. 987, reversing 298 P.2d 375 [picketing to induce consumer boycott preempted].

Respondent apparently fails to realize that state regulation of one aspect of collective bargaining affects all its aspects:

> "The problems which arise during employee organization, the selection of a bargaining representative, the negotiation of a series of collective bargaining agreements and their day-to-day administration are all phases of a continuous human relationship. Government intervention at one point inevitably affects the whole course of events." Cox, *Federalism in Labor Law*, 67 Harv. L.Rev. 1297 at 1315 (1954).

To apply state law to the administration of a collective agreement, for example, "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Union v. Lucas Flour Co., supra,* at 103. Similarly, to apply state law to economic pressures employed during negotiation of a collective agreement would inevitably exert a disruptive influence upon both the use of such pressures and the substantive terms of the agreement. The two are so interdependent that, to paraphrase, if a [state] "could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." *NLRB v. Insurance Agents' International, supra,* at 490. This interdependence, coupled with Congressional intent to preserve the voluntary character of collective bargaining, explains why Congress deliberately refused to prohibit resort to those economic tactics which it did not affirmatively protect. Congress recognized that prohibition of resort to these tactics would necessitate a greater degree of control over the terms of collective bargaining than it desired:

> "As the parties' own devices become more lim-

> ited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations." *(Id.* at 490)

Indeed, Congress was so intent on preserving the free play of the economic pressures within the specific limits it itself set that it refused to authorize the National Labor Relations Board to become "an arbitor of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands" *(Id.* at 497).

Thus, Congress envisaged the use of economic pressures not, as Respondent appears to believe, as "a grudging exception" *(Id.* at p. 495) to its over-all scheme, but as an integral part of its scheme. It, therefore, intended that parties to a labor dispute may employ economic pressures which Congress neither protected nor prohibited, free from legal restraint but not free from "the economic consequences of its use" *(Id.* at 467). For "Congress furmulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces." *Weber v. Anheuser-Busch,* 348 U.S. 468, 480. And, as part of this code, Congress intended that labor unions should be "... free to use persuasion, including picketing, not only on the primary employer and his employees but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer. ..." *Electrical Workers Local 761 v. Labor Board,* 366 U.S. 667, 672.

Indeed, as Professor (now Solicitor General) Cox pointed out:

> "The precedents holding that a state may not grant a preventive remedy against conduct which is prohibited by the N.L.R.B. or which *may* be protected or *may* be prohibited are explicable only upon the underlying premise, sometimes expressed but also unarticulated, that the N.L.R.A. subjects employee organization and collective bargaining to a single uniform code of regulation." (Italics in original) Cox, *Proceedings of the ABA*, Section of Labor Relations Law, 12 at 19.

Hence,

> "The total pre-emption of state laws dealing with unionization and collective bargaining, including resort to peaceful strikes and picketing, is consistent with the implications and philosophy of the N.L.R.A. whereas imposing additional obligations under state law, whether by injunction, criminal prosecution or damages, would often interfere with the working out of the national labor policy." *(Id.* at 20)

This Court expressed the same principle in *Bethlehem Steel Co. v. New York Labor Board*, 330 U.S. 767 at 774:

> "[W]hen federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency."

In short, Ohio common law must yield because "Congress occupied this field and closed it to state regula-

tion." *Automobile Workers v. O'Brien*, 339 U.S. 454 at 457.

Moreover, in selecting which forms of economic pressure should be prohibited, protected, or permitted, Congress struck the "balance [it deemed appropriate] between the uncontrolled power of management and labor to pursue their respective interests." *Local 1976 Carpenters v. NLRB, supra*, at 100.

The Ohio common law upsets this balance by strengthening employers in a way not intended by Congress. For as this Court recently said in considering appeals to managerial personnel of secondary employers to support a primary dispute,

> "Such an appeal would not have been a violation of § 8(b)(4)(A) before 1959, and we think that the legislative history of the 1959 amendments makes it clear that the amendments were not meant to render such an appeal an unfair labor practice." *NLRB v. Servett*, No. 111, October Term, 1963, Slip Op. p. 4 (Decided April 20, 1964).

For the balance Congress deemed appropriate to prevail, therefore, Ohio common law must give way. Otherwise, "the variegated laws of several states" shall displace the "single, uniform, national rule *(San Diego Building Trades v. Garmon, supra*, at 241) Congress sought and nullify Congressional "judgment in favor of uniformity." *Guss v. Utah Labor Relations Board*, 353 U.S. 1, at 11.

In sum, adoption of Respondent's position would authorize states to intrude in the process of collective bargaining, upset the balance between the rights of labor and management that Congress deemed appro-

priate, and destroy the uniformity Congress sought. For each of these reasons, the Ohio law must yield to paramount federal law.

IV. THE "TOTALITY OF EFFORTS" RULE PENALIZES PROTECTED ACTIVITIES

Respondent argues that the "totality of effort" rule is an application of the principle "that a wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures,* 327 U.S. 251 at 265. Under this principle, where damages cannot be measured with exactness and precision, the courts may assess damages on the basis "of just and reasonable inference, although the result may be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, at p. 563. Had the District Court applied this principle, it would have assessed damages based upon the "loss suffered as the result of Defendant's unlawful strike activity" (R. 276, Conclusion of Law No. 6), even if this loss could not be "measured with exactness and precision." Instead, holding that "the totality of defendant's efforts may be considered," the District Court assessed damages "based upon all loss suffered as a result of defendant's unlawful strike activity against the plantiff *and* as a result of plaintiff's having fewer truck driving employees working during the strike than he would have had *but for the combination of defendant's lawful and unlawful strike activity* against the plaintiff" (Italics added. Conclusion of Law No. 6, R. 276). Thus, the Court assessed damages not upon an estimate of the loss attributable to Local 20's unlawful activities

but upon an estimate of the loss attributable to the "totality of defendant's efforts," that is, to the "combination of defendant's lawful and unlawful activities."

Contrary to Respondent, then, the "totality of effort" rule is not an application of an established principle of the law of damages but a new "principle" of labor law. This "principle" may be stated to be as follows: A union engaging in unlawful activities during a strike shall be liable for all loss flowing from the strike, regardless of whether or not such loss is reasonably attributable to the unlawful activities.

As we demonstrate in our main brief (pp. 38-44), such a principle conflicts not only with established principles of the law of damages but also with fundamental purposes of labor law. It should, therefore, be rejected.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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